effectually dispose of the case. They clearly support the defendants Gaius Munger and Celia Munger's claim to the property of a homestead, and decide, that as against the assignee, who took in hostility to their deed, they are not estopped by it; but as against him they can maintain their exemptions, and also, that the decree against Isadore does not affect them, and that the assignee does not derive any new title as against them therefrom.

Such being the rights of the parties as against the assignee in bankruptcy, the plaintiff who purchased of the assignee, and with full knowledge of the condition of the estate, and claims of Gaius Munger, occupies no better position than the assignee. By the deed he succeeded to the rights of the assignee only; and, as I have determined that the defendants are entitled to their homestead exemption as against the assignee, the title of the plaintiff to this property, it being their homestead, has failed, and the plaintiff has failed therefore to show title to the property in controversy.

I therefore find that the plaintiff is not the owner of the premises described in the complaint, nor is he entitled to the possession thereof; and direct judgment in favor of the defendants, with costs.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF PENNSYLVANIA.[2]

SUPREME COURT OF VERMONT.[3]

SUPREME COURT OF WISCONSIN.[4]

AGENT. See *Evidence; Usury.*

AMENDMENT. See *Arbitration and Award.*

ARBITRATION AND AWARD.

Action on Award—Amendment—Evidence.—In an *action upon an award* made by H. and S., two of the three arbitrators to whom, or a majority of them, the parties had submitted "all controversies and matters of difference existing between them of every kind and nature whatsoever," the answer was, (1) that the only matter of difference between the parties at the time of such submission was connected with

[1] From J. W. Wallace, Esq., Reporter; to appear in vol. 19 of his Reports.

[2] From P. F. Smith, Esq., Reporter; to appear in 74 Pennsylvania State Rep.

[3] From J. W. Rowell, Esq., Reporter; to appear in 46 Vermont Reports.

[4] From Hon. O. M. Conover, Reporter; to appear in 34 Wisconsin Reports.

an action by plaintiff against defendant for an alleged assault, &c., and that the arbitrators heard evidence concerning other matters, not in controversy between the parties, and considered the same in making their award; and (2) that before the award was made, the arbitrators mutually agreed to resign, and did resign, their authority as such, and that afterwards H. and S. made the award without notice to or the knowledge or consent of G., the third arbitrator. Defendant was permitted to *amend* the answer by inserting a statement of the particular circumstances of the alleged assault, &c. *Held*, that the order allowing such amendment was within the discretion of the court, and did not involve the merits nor necessarily affect the judgment, and cannot be reviewed on appeal from the judgment (Tay. Stats. 1632, § 6), and was probably not itself appealable: *McCord* v. *McSpaden*, 34 Wis.

Evidence having been admitted for the plaintiff which tended to show that on the day when G. withdrew from the arbitration, defendant recognised the board of arbitration as still in existence and competent to make an award, it was not error to admit evidence for defendant, to show that at the time of such recognition he had not been informed of G.'s withdrawal: *Id.*

It was not error to permit defendant, as a witness for himself in this action, to state the nature of the difference between himself and plaintiff "as detailed by the witnesses before the arbitrators," *for the purpose only* of showing that the arbitrators acted upon matters not submitted to them, the court at the same time ruling that defendant could not in this action "go into the merits of the controversy" submitted to arbitration: *Id.*

Where an issue of fact, not raised by the pleadings, was distinctly submitted to the jury without objection, the admission of any proper evidence of such fact (not objected to on the ground that the issue was not made by the pleadings, but only upon other grounds) cannot be treated as error. In such a case the pleadings may be amended (if necessary) to conform to the facts proved: *Id.*

Where the question was, whether either of the acting arbitrators was guilty of any misconduct or unfairness which invalidated the award, a witness, being requested to state what facts he knew, answered that "when defendant made a statement that appeared to bear hard on plaintiff, S. would ask a question in order to lighten it up a little, and when it bore on defendant's side, S. tried to do away with it." *Held*, that this was a statement of an alleged *fact*, having a direct bearing on the question at issue, and the court did not err in refusing to strike it out: *Id.*

ATTORNEY. See *Evidence.*

Contempt of Court—Disbarring—Mandamus.—The Act of Congress of March 2d 1831, entitled "An act declaratory of the law concerning contempts of court," limits the power of the Circuit and District Courts of the United States to three classes of cases: 1st, where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; 2d, where there has been misbehavior of any officer of the courts in his official transactions; and 3d, where there has been disobedience or resistance by any officer, party, juror, witness or other person, to any lawful writ,

process, order, rule, decree or command of the courts: *Ex parte Robinson*, 19 Wall.

The seventeenth section of the Judiciary Act of 1789, in prescribing fine or imprisonment as the punishment which may be inflicted by the courts of the United States for contempts, operates as a limitation upon the manner in which their power in this respect may be exercised, and is a negation of all other modes of punishment: *Id.*

The power to disbar an attorney can only be exercised where there has been such conduct on the part of the party complained of as shows him to be unfit to be a member of the profession; and before judgment disbarring him can be rendered he should have notice of the grounds of complaint against him and ample opportunity of explanation and defence: *Id.*

Mandamus is the appropriate remedy to restore an attorney disbarred, where the court below has exceeded its jurisdiction in the matter: *Id.*

Bills and Notes.

Conditional Promise—Reasonable Time.—A paper promising to pay with interest, a sum of money specified and acknowledged to be due, "as soon as the crop can be sold or the money raised from any other source," is not in either form or effect a promissory note: *Nunez* v. *Dautel*, 19 Wall.

It is a promise to pay the money specified upon the occurrence of either of the events named in the paper, OR after the lapse of a reasonable amount of time within which to procure, in one mode or in the other, the means necessary to meet the liability: *Id.*

It does not mean that if the crop should be destroyed or could never be sold, and the parties promising could not procure the money from any other source, the debt should never be paid: *Id.*

The question of what was a reasonable time (there being no evidence in the case but the written promise itself), was a question for the court: *Id.*

Five years and more is much more than a reasonable time: *Id.*

Negotiability—Conditional Time for Payment.—A note "Twelve months after date (or before if made out of the sale of a machine)" I promise to pay to J. F. Huston or bearer," &c. *Held* to be negotiable: *Ernst* v. *Steckman*, 74 Pa.

A note to be negotiable must be for the payment of money at a fixed period or an event which must inevitably happen; it is not negotiable if its payment depends upon a contingency, although that may in fact happen: *Id.*

A note may be negotiable if payable *certainly* at a fixed time, although subject to a contingency under which it may become due earlier: *Id.*

Boundary. See *Deed.*

Confederate Notes. See *Removal of Causes.*

Meaning of word Dollars.—Notes issued by the Confederate government having become the currency in which contracts were made and business conducted in the insurrectionary states, during the recent civil war, and such notes having been designated by general custom as notes for so many "dollars," parol evidence is admissible, where suit is brought . . . to enforce a contract payable in "dollars," and made

during the war, to prove—the above condition of things being first shown—that the term "dollars" as used in the contract meant, in fact, Confederate notes. In the absence of such evidence the presumption of law would be that by the term "dollars," the lawful currency of the United States was intended. *Thornton* v. *Smith*, 8 Wallace 1, explained: *The Confederate Note Case*, 19 Wall.

The ordinance of North Carolina of 1865 declared that all existing contracts solvable in money, whether under seal or not, made after the depreciation of Confederate currency, before the first day of May 1865, and then unfulfilled (except official bonds, and penal bonds payable to the state), should "be deemed to have been made with the understanding that they were solvable in money of the value of the said currency;" but at the same time provided that it should be "competent for either of the parties to show, by parol or other relevant testimony, what the understanding was in regard to the kind of currency in which the same were solvable," and that in such case "the true understanding," should regulate the value of the contract. *Held*, That the understanding of the parties might be shown from the nature of the transaction, and the attendant circumstances, as satisfactorily as from the language used; and particularly that it might be shown from the length of time during which the contracts had to run before maturing; and that accordingly when bonds of a railroad company were issued in May 1862, payable at dates varying from seven to thirteen years afterwards, the inference was justified that the company intended at the time of issuing them, that the bonds should be paid in lawful money instead of Confederate notes: *Id.*

The interest payable on a bond, issued as above mentioned, follows the character of the principal, and is payable in like currency: *Id.*

Usury as a defence, must be especially pleaded or set up in the answer to entitle it to consideration: *Id.*

CONSTITUTIONAL LAW. See *Municipal Corporations.*

Tonnage Tax.—A state cannot, in order to defray the expenses of her quarantine regulations, impose a tonnage tax on vessels owned in foreign ports, and entering her harbors in pursuit of commerce: *Peete* v. *Morgan*, 19 Wall.

Contract—Impairing Obligation of.—Where in a university of learning, belonging to the state, and which the state was in the habit of governing through curators appointed by itself (such as the University of Missouri), a person was appointed by the curators a professor and librarian, for six years from the date of his appointment, "*subject to law*," *held* that the legislature could vacate his office, appoint new curators, and without fault on the part of the professor assigned, order a new election of a professor to the same professorship, and of a librarian, before the expiration of the six years: *Head* v. *The University*, 19 Wall.

Commerce between two States—Private Contracts.—The Act of Congress of June 15th 1866, authorizing every railroad company in the United States, whose road was operated by steam, and its successors and assigns, to carry upon and over its road, boats, bridges and ferries all passengers, troops, government supplies, mails, freight and property, on their way from one state to another state, and to receive compensation

therefor, and to connect with roads of other states so far as to form continuous lines for the transportation of the same to their place of destination; and the Act of July 25th 1866, authorizing the construction of certain bridges over the Mississippi river, and among others a bridge connecting Dubuque with Dunleith, in the state of Illinois, and providing that the bridges, when constructed, should be free for the crossing of all trains of railroads terminating on either side of the river, for reasonable compensation, were designed to remove trammels upon transportation between different states, interposed by state enactments or by existing laws of Congress, and were not intended to interfere with private contracts and annul such as had been made on the basis of existing legislation and existing means of interstate communication: *Railroad Company* v. *Richmond et al.*, 19 Wall.

Contracts valid when made, continue valid, and capable of enforcement, so long as peace lasts between the governments of the contracting parties, notwithstanding a change in the conditions of business which originally led to their creation: *Id.*

The power to regulate commerce among the several states was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating state legislation; it was not intended that the power should be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to such intercourse: *Id.*

Accordingly, a contract between a railroad company and an elevator company, that the latter company, in consideration of erecting and using for that purpose an elevator, should have for a prescribed term the handling, at a stipulated price, of all grain brought by the railroad company in its cars to the city of Dubuque, on the Mississippi river, to be transmitted to a place beyond, did not cease to be valid and binding upon the parties because afterwards, by the construction of a railroad bridge across the Mississippi at Dubuque it became unnecessary for the railroad company or its lessee, and a useless expense to it, to have the grain brought by it to Dubuque handled at that place. The enforcement of the contract after the construction of the bridge was not an interference with the power of Congress to regulate commerce between the states: *Id.*

CORPORATION. See *Taxation.*

DAMAGES. See *Negligence; Stamp; Usury.*

DEBTOR AND CREDITOR.

Trustee Process—Liability of Partnership Demand for the Sole Debt of one of the Firm.—The defendant contracted in his own name with the trustee, to build a bridge for the trustee. W. was in fact partner with the defendant in the transaction, but the trustee had no knowledge of it. The defendant and W. both worked on the job. *Held*, that the trustee was not chargeable for any part of the contract price, in a suit against the defendant alone for his sole indebtedness: *Bartlett* v. *Woodward*, 46 Vt.

DEED.

Construction of—When Monuments will govern Courses and Distances —Parol Evidence.—The description contained in the plaintiff's deed of

the *locus in quo*, after giving three courses, and coming to a road upon the east line of the plaintiff's land, continued as follows: "Thence N. 17° E., 8 rods and 17 links, on the west side of said road; *thence N. 29° E., 6 rods and 18 links;* thence N. 9 rods; thence N. 38¼° E., 18 rods; thence N. 60½° E., 4 rods and 10 links; *thence N. 46½° E., 7 rods and 17 links to the corner near the house formerly owned by M. Castello.*" The courses and distances above given constituted the east line of the *locus in quo*. The defendants claimed that there was a mistake in the fifth course given in the deed—that it should have been N. 29° W., instead of N. 29° E—and gave evidence tending to show that a line run with such corrected course, would strike the shed at said house; whereas a line run upon the courses named in the deed, ended two or three rods north-east of said house. The plaintiff testified that he never claimed to own east of said road, and that he always claimed the corner at or near said house, to be his north-east corner. But, in following the courses mentioned in the deed, it appeared that some portion of said road, and in some places land east thereof, were included in the description in said deed. The court charged the jury that, notwithstanding the evidence as to the extent of the plaintiff's claim in regard to the location of his east line, he would be entitled to hold so far as the courses and distances given in the deed, carried him, and that the courses and distances as given in the deed, controlled his right, and if by following them, some part or all of the road was conveyed, he could recover for trespasses committed thereon, unless barred by a license claim by the defendants. *Held*, no error: *Bagley* v. *Morrill*, 46 Vt.

In order for an application of the rule, that monuments govern courses and distances, the location of the monuments must be proved; and parol evidence is admissible for that purpose. If no monuments are mentioned in the deed, or if mentioned, their existence and location are not proved, courses and distances will govern: *Id.*

In the construction of a deed, in order to warrant the court in assuming a mistake in the course of a line, and substituting another, the deed itself, or the deed with proof of such facts as are competent to be shown in aid of the construction of a written instrument, must contain the necessary elements to make such assumption a matter of legal construction of the deed, as contradistinguished from matter of extrinsic proof: *Id.*

DIVIDEND. See *Taxation.*

EVIDENCE. See *Arbitration*; *Negligence*; *Trespass.*

Judicial Notice.—This court does not take judicial notice of the various orders issued by a military commander in the exercise of the military authority conferred upon him: *Burke* v. *Miltenberger*, 19 Wall.

Privileged Communications—Principal and Agent.—In order to make communications to counsel privileged, they must be made to them confidentially, as counsel; the relation of attorney and client must exist at the time; and the communication must be made for the purpose of obtaining advice in regard to legal rights. A general retainer in the matter as to which advice is sought, is not necessary; but the attorney must be counsel in that matter, and the communication made to him as such: *Earle* v. *Grout*, 46 Vt.

The facts that make communications privileged, must be proved, and

the burden lies on him who seeks to exclude them as evidence because they are privileged: *Id.*

The declarations of an agent are admissible against his principal, if made in the execution of his agency; but not, if made afterwards: *Id.*

EQUITY. See *Fraud; Vendor and Purchaser.*

EXECUTIVE OFFICES. See *Statute.*

FORMER ACTION. See *Negligence.*

Judgment—Cause of Action.—The defendant recovered judgment by default against the plaintiffs for the use of his horse while it was being kept by them. The plaintiffs subsequently sought, in this action, to recover of the defendant for the keeping of the horse. *Held*, that the defendant's just claim in his suit against the plaintiffs, was for the use of the horse, they keeping it, and that, nothing appearing to the contrary, the presumption was that the damages in that suit were assessed upon that basis; consequently, that that adjudication included and merged the plaintiff's claim for keeping said horse: *Bemis* v. *Jennings*, 46 Vt.

FRAUD.

Deed obtained by Fraud—Control of a Court of Equity.—Where land of an intestate had been sold and conveyed to A. by the administrator without authority of law, so that the title remained in the heir, and B. obtained a conveyance from the heir for a nominal consideration, by fraudulently representing that he was procuring it for the benefit of A., and to cure the defects in his title: *Held*, (1.) That the *legal title passed* by such conveyance from the heir to B. (2.) That A., or one claiming under him, had an *equitable interest* in the land by reason of such fraud: *Lombard* v. *Cowham*, 34 Wis.

If the deed to B. were *void* by reason of such fraud, that would be a *legal* defence to an action of ejectment by B. against A.'s grantee, and the question of fraud would be one for the jury, under a *general denial* in the answer: *Id.*

But such deed not being void in law, defendant cannot avail himself of the fraud as a defence at law under a general denial, but must set it up by *counter-claim* as a ground of positive relief *in equity;* and the issue thus made must be determined *by the court: Id.*

Where, therefore, the court admitted evidence of the alleged fraud under a general denial, and instructed the jury that if plaintiff's deed was procured by such fraud it was void, and he had no title, a *judgment* upon a verdict in defendant's favor *must be reversed: Id.*

FRAUDS, STATUTE OF. See *Sale.*

HIGHWAY. See *Negligence.*

HUSBAND AND WIFE. See *Negligence; Usury.*

INSURANCE.

Alienation of Property Insured—Sale by Judicial Process.—Real estate of a decedent, the buildings on which were insured, was sold at Orphans' Court sale; before its confirmation the buildings were burned;

Held, that the sale was not such alienation as to avoid the policy: *The Farmers' Mut Ins. Co.* v. *Graybill*, 74 Pa.

The suit on the policy was properly brought in the name of the administrator to the use of the vendee; who had sufficient interest to give notice of the loss: *Id.*

Insurance—Suicide—Insanity.—In an action on a life policy, the assured having taken his own life, and the allegation being that he was insane, the court charged: "If the assured was not conscious of the act he was committing, but acted under an insane impulse or delusion sufficient to impair his understanding or will, or if his reasoning was so far overthrown by his mental condition that he was incapable of exercising his judgment in regard to the consequences, the defendants are liable. *Held* not to be error: *American Life Ins. Co.* v. *Isett's Adm.*, 74 Pa.

A point was: "If F. B. Isett, at the time of his death, was conscious that his death would follow the discharging of the pistol in his own hands, there can be no recovery, although he was laboring under mental depression or disturbance of the mind." The court below negatived the point. *Held* not to be error: *Id.*

JUDGMENT.

Power of Court over—Clerical Error.—Except as authorized by the statute (R. S. ch. 125, sec. 38), the court, in cases tried by it, cannot, upon motion, *vacate a judgment after the term* at which it was entered, for errors in law or fact committed in rendering it, or occurring before it was pronounced. *Ætna Life Ins. Co.* v. *McCormick* (20 Wis. 565), and other cases in this court: *Scheer and Wife* v. *Keown*, 34 Wis.

Per DIXON, C. J. This rule, while it forbids in all cases the vacating of a judgment at a subsequent term for the purpose of *granting a new trial*, does not forbid:

(1.) The setting aside of an order or judgment *at the same term* at which it was rendered:

(2.) The vacation or amendment of a judgment so as to correct errors or mistakes of the clerk or other officer of the court, and make the record conform to the judgment actually pronounced, or the entry such as should have been made when the judgment was rendered:

(3.) The vacation, at a subsequent term, of a *void judgment*, or of judgments entered on *cognovit* or *confession*, over which courts exercise, on motion, a supervisory, equitable jurisdiction:

(4.) An order *vacating* a judgment, directing it to be *satisfied*, or *staying proceedings* upon it, to inquire into *facts occurring after it was rendered*, or after the time when the party could avail himself of them in the action, and which show that such judgment, or a part of it, ought not to be enforced against the party making the application: *Id.*

LIBEL. See *Tort.*

MONEY. See *Confederate Notes.*

MORTGAGE.

Fraudulent Representations—Innocent Holders.—A farmer and his wife on the line of a proposed country railroad, subscribed to stock in the road and mortgaged their farm, upon representations made to them

by agents of the road and others, in time of excitement got up at public meetings, that the road would prove a most lucrative investment of money, a very profitable thing to the neighborhood, and would enable farmers to sell the products of their farm at a large advance over existing prices. The making of the road was begun, and after a good deal of money had been laid out in grading, &c., the further making of it was absolutely stopped for want of funds, and it remained unmade. The mortgage thus got was assigned to a director of the road who was a large creditor of the road (then much embarrassed for money), when the mortgage was given. *Held*, on a bill by him to foreclose, that he was to be taken as an innocent holder for value ; and that on the distinction recognised by the law between a representation of existing facts, and a representation of facts yet to come into existence—the distinction between "promissory statements" based upon general knowledge, information, and judgment, and those representations which, from knowledge peculiarly his own, a party may certainly know will prove to be true or false—he was entitled to a decree: *Sawyer* v. *Prickett and Wife*, 19 Wall.

MUNICIPAL CORPORATION. See *Negligence.*

Taking Property for Street—Notice to Owner—Waiver.—Under that provision of the *Constitution of this State* (art. XI., sec. 2), which declares that "no municipal corporation shall take private property for public use against the consent of the owner, without the necessity thereof being established by the verdict of a jury," the proceeding to determine such necessity is *adversary* (*Lumsden* v. *Milwaukee*, 8 Wis. 485), and no step in its nature final is valid if taken without *notice* to the owner of the property: *Seifert* v. *Brooks*, 34 Wis.

A village charter (P. & L. Laws of 1871, ch. 381) attempts to regulate the proceeding to determine whether land sought to be condemned for a street in said village is necessary for that purpose (secs. 38–40), but makes no provision for *notifying the owner* of the time and place for the *assembling of the jury*. *Held*, that this omission renders the act, as to this subject, *unconstitutional*, and the proceedings taken under it *wholly void*: *Id.*

Whether the omission to provide for notice to the property-owner of the time and place appointed for the *selection of the jury* would have the same effect, is not here decided: *Id.*

The provision of said act which requires the jury to hear the declarations of the parties interested for or against the laying out of the street, does not relieve the objection that no *notice* to the party is provided for: *Id.*

Where the act is void for failing to provide for notice, the facts that the property-owner has been notified of the time and place of meeting of the jury, and that he is *actually present* at such meeting, but *without taking any part*, do not give the proceeding validity; nothing being done by him which constitutes a *waiver* of his rights: *Id.*

The landowner in such a case objected to the damages offered him by the village trustees on laying out the streets, and thereupon a jury was summoned pursuant to said charter, who assessed the damages, but it does not appear that the landowner accepted them. *Held*, that he is *not estopped* by these facts from denying the validity of the proceedings to determine the necessity of taking his land: *Id.*

National Banks.

Stock is Personal Property—Taxation of—Shares of stock in the national banks are personal property, and though they are a species of personal property which, in one sense, is intangible and incorporeal, the law which created them could separate them from the person of their owner for the purpose of taxation, and give them a *situs* of their own: *Tappan, Collector*, v. *Merchants' National Bank*, 19 Wall.

The forty-first section of the National Banking Act of June 3d 1864—which in effect provided that all shares in such banks, held by any person or body corporate, may be included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed under state authority, at the place where the bank is located, and not elsewhere—did this: *Id.*

This provision of the National Banking Act became a law of the property, and every state within which a national bank was afterwards located acquired jurisdiction, for the purposes of taxation, of all the shareholders of the bank, both resident and non-resident, and of all its shares, and power to legislate accordingly: *Id.*

Nothing in Article IX. in the Constitution of Illinois of 1848, which was still existing in 1867, prevented the legislature of the state from providing for the taxation of the owners of shares of the capital stock of a national bank in that state, at the place, within the state, where the bank was located, without regard to their places of residence: *Id.*

The act of the said legislature, passed June 13th 1867, so providing, was valid under the said constitution: *Id.*

Negligence. See *Stamp; Trespass.*

Former Action—Damages—Evidence.—Husband and wife having recovered final judgment in a joint action against defendant town, for personal injuries to the wife, occasioned by reason of the insufficiency of a highway in said town, the defendant is estopped, in an action by the husband to recover damages for the loss of the wife's service and for the expense of medical attendance, to deny facts put in issue and found against it in the former action: *Lindsey* v. *Town of Danville*, 46 Vt.

The ground of recovery is loss of service, and if the jury think that the sum paid for necessary labor substituted for the ordinary service of the wife, with interest thereon, is the measure of a just compensation for the loss of the wife's service, they are at liberty to find damages to that amount; and a charge to that effect is no error. Whether interest, *eo nomine*, is recoverable in an action of tort or not, a jury may consider *time*, in fixing upon reasonable damages: *Id.*

Evidence offered by the plaintiff to fix such sum, may be properly admitted; and evidence sought to be introduced by the defendant, tending to show that the wife was in ill health at some uncertain time prior to said injury, may be properly excluded: *Id.*

Evidence—Highway—Damages.—A witness who had examined the place of accident on a highway, and made some measurements of the width of the road at that and other points, with a rod, after having testified to the width of the road, and the width of the different kinds of carriages in use on highways, was allowed to testify that, *in his opinion*, the road was not wide enough at the place of accident for two team-wagons to pass each other. *Held*, no error: *Fulsome* v. *Town of Concord*, 46 Vt.

The defendant requested the court to charge, that if a load of hay, which, it appeared, stood in the highway at the time and place of accident, was an obstruction in the highway, and was the primary cause of the accident, the plaintiff could not recover, unless the town authorities knew of such obstruction, or ought to have known it, and had had a reasonable time to remove the same. The court refused to charge as requested; but charged, that notwithstanding the jury found that the load of hay was an obstruction, for which the town was in no way liable, and that the accident would not have happened if the hay had not been in the road, still if they found that the highway was insufficient by reason of being too narrow, or for want of a railing or muniment, and that such insufficiency contributed to the happening of the accident, —or, if the road had been sufficient in said particulars, that the accident would not have happened, notwithstanding the hay,—the plaintiff would be entitled to recover, if in other respects his case was made out. *Held*, no error: *Id.*

The defendant requested the court to charge the jury not to allow any feeling of sympathy for the plaintiff to influence them in deciding the case. The court charged the jury that they would remember to lay aside their feelings in the case, but said to them, "Of course none of us can do away, entirely, with our sympathies; we all have more or less feeling of sympathy for a party who has been injured, and it is right we should; but, in making up your verdict in the case, you will lay aside your feelings of sympathy, as far as may be, and determine the issues in the case upon the evidence given in court, forgetting, as far as may be, the parties, and the consequences of your determination." *Held*, no substantial error, but that it would have been more satisfactory, had the judge been more decided and explicit in instructing the jury that their sympathy for the plaintiff should have nothing to do with their verdict: *Id.*

The court charged the jury in respect to prospective damages, that they should reduce the losses which the plaintiff would thereafter suffer from loss of time, doctoring, and personal suffering, to their present worth, or to such a sum as, being put at interest, would amount to the sum they found the plaintiff would lose in the future by reason of the injury. *Held*, no error: *Id.*

Municipal Corporation—Slippery Pavement.—In an action for an injury to plaintiff's person alleged to have been caused by the defective condition of a public walk in the defendant city, it appeared that plaintiff, on his way to a railroad depot, passed westward along the *south* side of a certain street until he reached a bridge connecting the east and west portions of said street; that after crossing the bridge, he *passed over to the north side* of said street, and, in descending from the bridge to the sidewalk, along a plank walk which descended about two and a half feet in twenty, he fell and was injured; that it was a bright starlight evening in winter, with snow upon the ground; that plaintiff had in one hand a satchel and in the other books; that there were strips nailed across said descending walk, but these were entirely covered with packed snow and ice, and the whole surface of the walk was smooth and slippery. It also appeared that plaintiff had been on the walk frequently, and knew that it was an inclined plane at this point; but there was no evidence that he knew of its peculiarly slippery and dangerous condition at that time. It was one of the principal walks of the city,

over which hundreds of persons were daily passing. There was a less descent from the bridge to the sidewalk on the *south* side of the street; and the middle of the street was planked. *Held*, that upon these facts the court did not err in refusing to instruct the jury, as a proposition of law, that plaintiff was guilty of negligence in descending upon this walk to the north side of the street; but that question was properly left to the jury: *Perkins* v. *The City of Fond du Lac*, 34 Wis.

The mere slippery condition of a sidewalk, arising from the ordinary action of the elements (as snow and ice), is not a defect which renders the town or city liable under the statute (*Cook* v. *Milwaukee*, 24 Wis. 270, and 27 Id. 191); but if the walk is in other respects unskilfully or improperly built, so as unnecessarily to increase the danger of persons walking thereon while it is covered with snow and ice, this will render it defective or insufficient within the meaning of the statute: *Id.*

Evidence for the defendant city "that there were a great number of bridges in the city that were built higher than the street, and that nearly all the approaches of these bridges were raised," was properly rejected as irrelevant to the issue: *Id.*

Nuisance.

Change of Condition of Neighborhood.—A business which is useful and necessary in large communities, and which is not a nuisance of itself, may become so in view of the circumstances in the neighborhood in which it is proposed to carry it on: *Wier's Appeal*, 74 Pa.

There is a distinction between a long-established business, which has become a nuisance in a locality from the increase of population, &c., and a new erection threatened in such vicinity; carrying on an offensive trade for any number of years in a place remote from buildings and public roads, does not authorize its continuance there when houses have been built and roads laid out and it is a nuisance to the occupants and travellers, but it requires a much clearer case for the chancellor to compel the removal of an establishment in which the owner has invested his capital and carried on business for a long time, than of one to be established for the first time, against notice that there will be application to equity to prevent it: *Id.*

The legislature has recognised that the storing of gunpowder in large quantities in thickly settled places is a nuisance to be guarded against by public authority: *Id.*

The erection of a powder-house was in this case restrained, without the existence of actual irreparable damage, but to prevent it: *Id.*

Partnership. See *Debtor and Creditor.*

Removal of Causes.

When the Act of 1867 *applies.*—The Act of Congress of March 2d 1867, under which a removal may be had of causes from a state to a Federal court, only authorizes a removal where an application is made before final judgment in the court of original jurisdiction, where the suit is brought. It does not authorize a removal after an appeal has been taken from such judgment of the court of original jurisdiction to the Supreme Court of the state: *Stevenson* v. *Williams*, 19 Wall.

Where the judgment of a state court was annulled by the decree of a court of the same state, on the ground that the notes on which the

judgment was rendered were given for a loan of Confederate money, and that the transactions which resulted in the acquisition of the notes were had between enemies during the late civil war, in violation of the proclamation of the President forbidding commercial intercourse with the enemy, this court cannot review the ruling in these particulars. It conflicts with no part of the constitution, laws or treaties of the United States, and presents no Federal question: *Id.*

Final Trial or Hearing.—Where, after a suit has been properly removed from a state court into the Circuit Court of the United States, under the Act of March 2d 1867, which allows such removal, in certain cases specified by it, "at any time before the final hearing or trial of the suit," the state court still goes on to adjudicate the case, against the resistance of the party who got the removal, such action on its part is a usurpation, and the fact that such a party has contested the suit in such state court, does not, after a judgment against him, on his bringing the proceedings here for reversal and direction to proceed no further, constitute a waiver on his part, of the question of the jurisdiction of the state court to have tried the case: *Insurance Company* v. *Dunn*, 19 Wall.

The language above quoted—"at any time before the final hearing or trial of the suit"—of the Act of March 2d 1867, is not of the same import as the language of the Act of July 27th 1866, on the same general subject—"at any time before the trial or final hearing." On the contrary, the word "final" in the first-mentioned act, must be taken to apply to the word "trial" as well as to the word "hearing." Accordingly, although a removal was made after a trial on merits, a verdict, a motion for a new trial made and refused, and a judgment on the verdict, yet it having been so made in a state where by statute the party could still demand, as of right, a second trial, *held*, that such first trial was not a "final trial" within the meaning of the Act of Congress; the party seeking to remove the case having demanded and having got leave to have a second trial under the said statute of the state: *Id.*

Sale.

Change of Possession.—Where the transfer of possession of chattels corresponds with the nature of the property sold and the relation of the parties, the sale will be valid unless fraudulent in fact: *McMarlan* v. *English*, 74 Pa.

Where there has been an actual and continued change of possession the court cannot pronounce the sale fraudulent in law: *Id.*

The separation of the property from the possession of the vendor must be at the time of sale or a reasonable time afterwards: and may be made by surrendering the power over it to the vendee: *Id.*

School Teacher.

Right to maintain Discipline in School—Expulsion of Scholar.—It is the duty of a teacher to maintain proper and necessary discipline in school; and to that end, a teacher may, when necessary, expel a scholar; and if the prudential committee insist upon the return of such scholar to the school, when his presence would be fatal to the maintenance of such discipline, the teacher may lawfully quit the school, and recover his salary: *Scott* v. *School District No.* 2 *in Fairfax*, 46 Vt.

STAMP.

Meaning of Dollars—Costs.—Where the consideration in a deed is expressed to be so many dollars, the stamp required is the same whether in point of fact the sum named be paid in gold or in notes of the United States, made by law a legal tender: *Hall* v. *Jordan*, 19 Wall.

A party alleging that the stamp on a deed was too small (he being by the law of the state where the deed was made obliged to put on the stamps), who brought such a question here, delaying the judgment below for two years and a half, punished under the twenty-third rule, by a judgment of ten per cent. damages in addition to interest and costs: *Id.*

STATUTE.

Construction of by Executive Officers.—The construction given to the Internal Revenue Act by commissioners of internal revenue, even though published in an Internal Revenue Record, is not a construction of so much dignity that a re-enactment of the statute subsequent to the construction having been made and published, is to be regarded as a legislative adoption of that construction; especially not when the construction made a proviso to an act repugnant to the body of the act: *Savings Bank* v. *United States*, 19 Wall.

Repeal by second Statute on the same Subject.—The repeal of statutes by implication is not favored. If there be two affirmative statutes on the same subject, there must be a clear inconsistency or repugnancy, that the later one may repeal the former: *Somerset and Stoystown Road*, 74 Pa.

A subsequent affirmative statute is a repeal of a former as to the same matter, if it introduces a new rule and is intended as a substitute for the former: *Id.*

TAXATION.

Dividend—Corporation.—A profit upon the capital or investment of a corporation, either made or passed to the stockholders without declaration of a dividend, or a dividend declared, becomes the measure of the state tax on dividends: *Commonwealth* v. *P., F. W. and C. Railway Co.*, 74 Pa.

If a dividend be declared, the stock is taxable on the basis of the declaration; and the company is estopped by the declaration whether the dividend be earned or not: *Id.*

A nominal or arithmetical increase of shares without transferring to the stockholders anything out of the treasury or property of the corporation, is not a dividend or profit, either made or declared: *Id.*

A railroad company leased its road to another corporation for nine hundred and ninety-nine years, at 12 per cent. per annum on its capital; the first company increased the number of its shares 71 per cent. (the par value of both the original and increased shares being $50), on which the stockholders were to receive 7 per cent. dividend, being the same amount they would have received on the original number of shares at 12 per cent. *Held*, that this increase was not subject to state taxation as a dividend or profits: *Id.*

Dividends.—A railroad company was authorized to sell their stock "to such persons and for such a price and on such terms as they shall

deem best; the company gave the option to its stockholders "of taking *pro rata* for each share the sum of $40 of the capital stock upon the payment of $4 for each share of stock," and declared a dividend of 7 per cent. per annum, payable quarterly. The increase of stock was $1,000,000. *Held*, that this increase was not a stock dividend liable to state taxation: *Commonwealth* v. *Erie and Pittsburg R. Co.*, 74 Pa.

It is not a *presumption*, that an increase of stock authorized by law is a stock dividend. Whether the increase is real or pretence is a question of fact for the jury: *Id.*

Tenant at Will.

Tenancy at Will, and from Year to Year—Notice to quit.—The defendant, by the parol permission of the plaintiff, went into possession of certain premises as tenant to the plaintiff, without any agreement as to the time of holding or the payment of rent, and continued in possession about fourteen years. He built a barn on the premises, and repaired the house. The plaintiff tried to settle with him; but could get nothing out of him but the repairs, and it would seem, he refused to pay rent. *Held*, that after such refusal, he could not claim that by his continued occupancy, his estate had become enlarged by reason of an implied liability to pay reasonable annual rent: *Rich* v. *Bolton*, 46 Vt.

Held, also, that said repairs, if made in compensation for the use, were not a payment of a yearly rent; but, rather, payments in gross, for the whole occupany: *Id.*

Held, also, that said tenancy did not ripen into a tenancy from year to year; because it lacked the essential element of *annual rent*, necessary to convert a tenancy at will into a tenancy from year to years: *Id.*

A tenant at will is not entitled to six months' notice to quit; but only to reasonable notice, and such as determines the will of the landlord; and when emblements are in question, such as will protect the tenant in his rights: *Id.*

Tort.

Joint Action—Libel.—In an action for tort against two or more, separate acts not committed with a common purpose or design, and without concert, will not authorize a joint recovery: *Leidig* v. *Bucher et al.*, 74 Pa.

If it be proved that only one was concerned the plaintiff may recover against him as if he only had been sued: *Id.*

In an action against four for libel, a point was, "It is not necessary to sustain the action to prove a joint engagement in making and publishing the libel; all that is required is to (prove) that each or any of defendants is guilty, and the jury can give a verdict against all or any one of the defendants, or separate verdicts against any two or more of them." The court denied the point, adding, "you may find against one of the defendants, but cannot find separate damages against both." *Held* to be correct: *Id.*

Defendants who have not conspired together or joined in committing the wrong should not be joined in the same action: *Id.*

Town. See *Negligence.*

Trespass.

Acceptance of Deed with Knowledge of prior Grant.—P. and wife, in 1872, conveyed to the town of O. "all the gravel contained in the first stratum of gravel" upon a strip of land described by metes and bounds, part of the N. ½, S. E. ¼ of sec. 1, in said town. In 1873 they conveyed to plaintiff, by warranty deed, "all of the N. ½, S. E. ¼ of sec. 1, which has not been conveyed to other persons by the grantors." Afterwards, P. and the other defendants, under the direction of the town supervisors and overseers of highways, entered upon said first-mentioned strip of land and removed gravel, &c., therefrom, to be used in improving the highways. In an action against them for trespass in so doing, *Held*, That upon the facts shown by the evidence (as to plaintiff's residence in the neighborhood, his familiarity with the use made of the gravel pit by the town before his purchase, the fact that said strip of land was enclosed by a fence so as to be out of the possession of P., and in that of the town, &c.), plaintiff is chargeable with knowledge of the existence of the deed of the gravel pit from his grantors to the town: *Quinlan* v. *Pierce and others*, 34 Wis.

Evidence—Self-Defence—Exemplary Damages.—Under the circumstances of this case, it was *held* not error for the county court to admit evidence of the pendency of certain suits in favor of the defendant against the plaintiff, growing out of the same controversy which led to the assault, for the purpose of showing the *animus* of the defendant towards the plaintiff: *Edwards* v. *Leavitt*, 46 Vt.

The amount and extent of force that one has a right to use in self-defence, depends, in some measure, on the perilous condition he has reason to suppose himself in from apprehended violence from his assailant, and what force he has reason to suppose necessary to protect himself. Hence, in an affray between the plaintiff and the defendant, where it was known to both that two hired men of the defendant were near by, it was held proper for the jury to consider that fact, as bearing on the question of how much force the defendant had a right to use, under the circumstances, in self-defence: *Id.*

It has long been settled in this state, that in actions of trespass for assault and battery, the jury may give exemplary damages. And the pendency of a criminal prosecution for the same act, is no bar to the recovery of such damages: *Id.*

Usury. See *Confederate Notes.*

Representations by Agent—Estoppel—Wife as Witness.—Where an agent employed by and acting for the borrower only, negotiates a loan for the highest legal rate of interest, and, without the knowledge or consent of the lender, retains a fee for his services, this does not make the loan usurious: *Sage* v. *Wright*, 34 Wis.

Plaintiff bought a note and mortgage without knowledge of any fact making them usurious, and afterward negotiated with the authorized agent of the borrower, in reference thereto, and such agent represented that the debt for which said note and mortgage were given, "was an honest debt and would be paid." On the faith of these representations plaintiff bought another note made by said borrower and secured by mortgage of the same land, and extended the time of payment of both notes. *Held*, that the borrower was bound by the representations of his

agent and was estopped from setting up the defence of usury to the first mentioned note and mortgage. *Id.*

A wife being empowered by our statute to sell and transfer to her husband a note and mortgage which are her separate property, "with like effect as if she were unmarried" (Tay. Stats., 1195, § 2), she must be held a competent witness for her husband to show that such note and mortgage are free from usury; such right in the vendor being an element in the value of the security, and necessary to protect her from liability to refund the consideration: *Id.*

Vendor and Purchaser.

Rescission for Fraudulent Representations—Inspection by Purchaser. —A., after reading certain representations of the character of B.'s farm, made by B. in a letter to his city agent for the sale of the property, visits the farm in person, but, on account of the depth of snow, cannot determine for himself the truth of B.'s representations, which are then and there repeated, in regard to the nature of the soil, the practicability of mowing the meadow land, &c.; and he purchases on the faith of such representations, which are fraudulent and false, paying a very much larger price than the farm is worth. *Held*, that equity will *rescind the contract: Risch* v. *Von Lilienthal and Wife*, 34 Wis.

The fact that A. visited the land before purchasing is *not conclusive*, under the circumstances of the case, that he did not finally purchase *on the faith* of B.'s said representations; especially as such visit was necessary to enable him to ascertain *other facts* relative to the situation of the farm, not included in such representations: *Id.*

Mere *inadequacy of consideration* is not of itself sufficient ground for rescinding a contract; but gross inadequacy of consideration may be of decisive weight in determining the question of *fraud*: *Id.*

Will.

Codicil—Conditional Revocation.—A testator made a will dated November 20th 1871; he made another dated January 13th 1873; he made a "codicil to my last will and testament," dated "this — day of January 1873." By the codicil, after refering to the law relating to bequests to charities, he provided, "Now I declare said will of 20th November 1871 to be my last will should I die before the 1st of March 1873, otherwise the will of 13th January 1873 shall be my last will." He died on the 23d of January 1873. *Held*, that the paper of November 1871 was his will: *Hamilton's Estate*, 74 Pa.

The paper of January 13th 1873 was not his will, the contingency on which it was to become so never having happened; and it did not therefore revoke the will of 1871: *Id.*

The codicil and the will of 1873 are to be construed as one instrument: *Id.*

The will of 1871 spoke from its date, and the charitable bequests were not avoided under the Act of April 26th 1855: *Id.*

Witness. See *Usury.*